LEE SOKH PING & ANOR

v.

ASIA COMMERCIAL FINANCE (M) BHD

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[CIVIL APPEAL NO: 12-29-2000]
12 DECEMBER 2000

CONTRACT: *Non est factum - Burden of proof - Party seeking to rely on the defence to prove*

CIVIL PROCEDURE: *Pleadings - Defence - Witness not cross examined on defence pleaded - Witness deposed to a defence not pleaded - Whether testimony could support defence*

The respondent had given a loan of RM200,000 to one Sundak Construction Sdn Bhd ('Sundak') pursuant to a loan agreement. The respondent alleged that the appellants had executed a letter of guarantee guaranteeing payment of the loan given to Sundak.

In their statement of defence the appellants admitted having signed a document but denied having the knowledge that the document signed was a document relating to a loan. They alleged that they had signed the document in full belief that they were signing a formal document without any liability. The appellants pleaded *non est factum.*

Held:

[1] Since the appellants sought to disown the guarantee document, it was for them to show that the document was different from what they thought it was.

[2] It is up to the person who had prepared a guarantee, explained its implications to the signatories and later witnessed the signing of the documents by the signatories, to consider whether it is necessary for him to put a note to that effect on the guarantee. The absence of such a note is only a factor to be considered in assessing the credibility of the witness and the weight to be attached to her evidence which must also be considered in the light of her evidence under cross examination as well as other evidence adduced at the trial.

[3] According to the first appellant ('SD1'), on the day she signed the document a person explained the contents to her in Mandarin and it was about the setting up of a company. To this the appellant had in effect deposed to a defence which was never pleaded.

[4] If what was deposed to in evidence by the appellants was indeed the defence of the appellants then they should have amended their statement of defence. In my judgment since this was not done, that defence should not be considered by the court.

[5] The defence pleaded in the statement of defence is not supported by the evidence of the appellants. The defence was not expressly put to SD1 when she was under cross examination by the appellants' counsel. Therefore even if the defence and the circumstances supporting that defence as stated by the appellants in their evidence had been pleaded in the appellants' pleading, they still could not be allowed to rely on the defence.

[6] The curious state of affairs regarding the defence in that the evidence given by the appellants was different from the defence pleaded did not escape the scrutiny and consideration of the learned trial judge. He concluded that the evidence of the appellants in court was an afterthought.

[7] In view of all the evidence in this case both oral and documentary, the court is not persuaded that the appellants did not know what they had signed. The learned trial judge was entitled to come to that conclusion and in doing so he had not misdirected himself or come to the wrong conclusion.

[Appeal dismissed with costs.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal [1995] 3 CLJ 639 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Caldera v. Gray [1936] MLJ 137 ***(refd)***
Chung Khiaw Ltd v. Hotel Rasa Sayang [1990] 1 CLJ 675 ***(refd)***
Kiong Man v. Kishen [1971] 1 MLJ 54 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667 ***(refd)***
Lii Tat Credit & Mortgage Sdn Bhd v. Tang Liing Kang [1988] 3 MLJ 104 ***(refd)***
Muniandy & Anor v. Muhamad Abdul Kader & Ors [1989] 2 CLJ 577 ***(refd)***
Saunders v. Anglia Building Society [1970] 3 All ER 961 ***(refd)***
Shamsudin Embun v. PT Seah & Co [1988] 2 MLJ 546 ***(refd)***
Sivalingam Periasamy v. Periasamy [1996] 4 CLJ 545 ***(refd)***

State Govt Of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***
The First National Bank of Chicago v. How Lee Realty [1981] 1 MLJ 183 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 41 r. 3

For the appellants - E Ramasamy; M/s E Ramasamy
For the respondent - John Clark Sumugod; M/s Sidek Teoh Wong & Dennis

Reported by Yow Ting Fong

JUDGMENT

Ahmad Maarop JC:

This is an appeal by the appellants against the decision made by the Sessions Court at Malacca on 8 June 2000 directing the appellants to pay to the respondent the sum of RM154,356.31 together with interest from 9 October 1997 and costs.

As disclosed in its statement of claim, the respondent had given a loan of RM200,000 to Sundak Construction Sdn. Bhd. ('Sundak Construction') pursuant to a loan agreement dated 23 December 1986. The respondent alleged that the appellants had, on 23 December 1986, executed a letter of guarantee guaranteeing payment of the loan given to Sundak Construction. Sundak Construction was said to have defaulted and/or neglected to pay the said loan despite repeated reminders. The respondent therefore sued Sundak Construction as well as the appellants for RM154,356.31, the amount payable as at 8 October 1997.

In their statement of defence the appellants admitted having signed a document but denied having the knowledge that the document signed was a document relating to a loan. They averred that a lawyer acting for the respondent was present at the material time. The lawyer explained to them in Chinese that the signing of the document was only a formality for the purpose of processing the loan to be given to Sundak Construction. They alleged that they were never informed that what they were about to sign was a guarantee. They alleged that they had signed the document in the full belief that they were signing a formal document without any liability. The appellants pleaded *non est factum*.

On 24 May 2000, at the commencement of the trial at the Sessions Court, no counsel appeared for Sundak Construction (the first defendant in the case). In fact it was not represented by anybody at all in court. The Sessions Court therefore entered judgment against Sundak Construction.

As could be seen from the grounds of judgment of the learned sessions court judge, the following facts were agreed or admitted:

(1) The respondent, a financial institution had given a loan of RM200,000 to Sundak Construction pursuant to a loan agreement dated 23 December 1986,

(2) The said loan was guaranteed by a document of guarantee dated 23 December 1986 which was signed by the appellants,

(3) A third party charge (Jilid 274, Persirahan No 4304/86 dated 23 December 1986) was executed as a security in favour of the respondent,

(4) The property charged pursuant to the said charge was sold in a public auction for RM245,521.32,

(5) The claim of the respondent was for RM154,356.31 as stated in para. 7 of the statement of claim. As seen from para. 7 of the statement of claim, the amount claimed was arrived at after deducting the amount of RM245,521.32 obtained from the aforesaid public auction,

(6) The appellants were the directors of Sundak Construction,

(7) By resolution dated 5 December 1986, the appellants had approved the acceptance by Sundak Construction of the loan of RM200,000 from the respondent. Also approved was the guarantee to be given by the appellants.

For the purpose of the trial at the Sessions Court, the parties had come to an agreement on the issues to be tried. These issues are as set out at pp. 236-237 of the appeal record. However, as could be seen from the notes of the proceeding in the Sessions Court (p. 46-47 of the appeal record) as well as the grounds of judgment of the learned judge of the Sessions Court, (p. 15 of the appeal record), the parties had, before the commencement of the trial, agreed that there was only one issue to be tried. The issue was whether the appellants were the guarantors of Sundak Construction pursuant to the guarantee agreement dated 23 December 1986. The case for the appellants was that they had no knowledge of the contents and the implications of the document which they signed on 23 December 1986.

Before me it was contended by learned counsel for the appellants, Mr. E. Ramasamy that the appellants did not know that they were signing a guarantee document for RM200,000. He submitted that it was for the respondent to satisfy the court that the appellants knew what they had

signed. In this connection Mr. E. Ramasamy raised the question whether the guarantee document was explained to the appellants. SP1 the solicitor who prepared the document was called by the respondent to give evidence. She said she had explained the document to the appellants in Mandarin. Mr. E. Ramasamy questioned how could SP1 recollect what transpired 14 years ago when all she had was the guarantee document itself to refer to. She did not have any other document or make any note on the guarantee document or indeed anywhere at all to support her claim that the document was explained by her to the appellants.

Submitting further Mr. E. Ramasamy cited the case of *Shamsudin b. Embun v. P.T Seah & Co* [1988] 2 MLJ 546 to support his contention that it was important for signatories to know what they were signing. He contended that in the case before the court, the document was not fully explained or understood by the appellants. Citing O. 41 r. 3 of the Rules of the High Court 1980, Mr. E. Ramasamy further contended that in the case of an affidavit by an illiterate person, the person administering the oath must certify in the jurat that the affidavit was read in his presence to the deponent, the deponent seemed to understand it and that the deponent made his signature in his presence. Without such a certification the affidavit could not be used in evidence unless the court is otherwise satisfied that it was read to and appeared to be understood by the deponent. By analogy Mr. E. Ramasamy submitted that the guarantee document was also an important document. Therefore, he submitted that SP1 should have made a note at the bottom of the guarantee document to state the language which was used to explain the document to the appellants and the name of the person who made the explanation. He frankly admitted however that this point had never been raised or considered before. Nevertheless, he urged the court to consider it.

In reply, learned counsel for the respondent, Mr. John Clark, in substance submitted that it was for the appellants to prove *non est factum*. He cited in support the cases of *Kiong Man v. Kishen* [1971] 1 MLJ 54, *The First National Bank of Chicago v. How Lee Realty* [1981] 1 MLJ 183 and *Lii Tat Credit & Mortgage Sdn Bhd v. Tang Liing Kang* [1988] 3 MLJ 104. In the circumtances of this case Mr. John Clark contended that the appellants had failed to show any merit in their defence.

At the outset I must say that I cannot accept the contention advanced on behalf of the appellants that it was for the respondent to satisfy the court that the appellants knew what they signed. On the anthorities, it is clear to me that since the appellants sought to disown the guarantee document, it was for them to show that the document was different from what they

thought it was *(Saunders v. Anglia Building Society* [1970] 3 All ER 961, *Lii Tat Credit & Mortgage Sdn Bhd v. Tang Liing Kang* [1988] 3 MLJ 104, *Kiong Man v. Kishen* [1971] 1 MLJ 54).

In *Saunders v. Anglia,* Lord Hodson in his judgment at p. 966 said:

> The burden of proving *non est factum* is on the party disowning his signature; this includes that he or she took care. There is no burden on the opposite party to prove want of care.

In *Kiong Man v. Kishen*; the defendant pleaded *non est factum*. In delivering his judgment Syed Agil Barakbah J (as he then was) said (at p. 55):

> What is then the standard of evidence required of the defendant to discharge the burden of proof that is laid down by law of the plea of *non est factum*? I think the law requires strong and clear evidence for its discharge. The defendant has to prove that had he known the class and character of the document in question, he would not have signed it.

In my view therefore the learned judge of the Sessions Court did not err when he held that the burden of proving *non est factum* was on the appellants.

In his grounds of judgment the learned Sessions Court judge held that the appellants had failed to prove the defence of *non est factum*. He was of the view that the appellants knew that they were signing a guarantee document.

SP1, the witness called by the respondent to testify was the lawyer who prepared the guarantee agreement signed by the appellants on 23 December 1986 (pp. 168-172 of the appeal record). SP1 had been in practice for 28 years. She testified that she prepared the guarantee agreement. She said she witnessed both the appellants signing the guarantee. According to her she had explained the document in Mandarin to the appellants and that the appellants informed her that they understood the document. Under cross examination she maintained the same version. She said she had read and explained to the appellants the terms and the effect of the guarantee before they signed it. She also explained to the appellants that the loan was given to Sundak Construction. She said she explained to the appellants that if Sundak Construction failed to pay, the appellants would have to pay.

As I have stated earlier, learned counsel for the appellants urged me to take a strict view of the absence of the note which states that the guarantee had been explained to the appellants. I do not think there is compelling justification for the court to insist that when a guarantee is explained to

the signatories there must be a note to this effect. In my view it is up to the person who had prepared a guarantee, explained its implications to the signatories and later witnessed the signing of the document by the signatories, to consider whether it is necessary for him to put a note to that effect on the guarantee. The absence of such a note as in the present case does not necessary lead to the conclusion that the guarantee was not explained to the appellants. In my view the absence of such a note is only a factor to be considered in assessing the credibility of SP1 and the weight to be attached to her evidence which must also be considered in the light of her evidence under cross examination as well as other evidence adduced at the trial.

As against the evidence of SP1, there is evidence of both the appellants. According to the first appellant (SD1), on the day she signed the document a person explained the contents to her. It was explained to her in Mandarin that the contents of the document was about the setting up of a company. According to her that she had signed the document in the belief that she was setting up a company. That was the defence raised by SD1 in her evidence under oath. The evidence of the second appellant (SD2) in substance was similar to that given by SD1. I hasten to add that this defence was completely different from the defence pleaded in the statement of defence. As I have alluded to elsewhere in this judgment, the defence pleaded by the appellants in their statement of defence was that a lawyer for the respondent had told them in Chinese that they were signing the documents only as a formality without any liability, for the purpose of processing the loan to the Sundak Construction and that it was never explained to them that what they were signing was in fact a guarantee. These circumstances are different from the circumstances supporting the plea of *non est factum* as disclosed in the appellants' evidence. To my mind the appellants had in effect deposed to a defence which was never pleaded. It is trite law that parties are bound by their pleadings and are not permitted to introduce evidence relating to facts not pleaded (*State Govt Of Perak v. Muniandy* [1986] 1 MLJ 490). The importance of pleadings in civil cases and the requirement of pleading defence in the pleading have been stressed from time to time by the courts. When a vital issue was not raised in the pleadings it could not be allowed to be argued *(Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667, *Muniandy & Anor v. Muhamad Abdul Kader & Ors* [1989] 2 CLJ 577, *Chung Khiaw Ltd v. Hotel Rasa Sayang* [1990] 1 CLJ 675.

In the case of *State Govt Of Perak v. Muniandy (supra)*, the respondent who was an employee of the appellant hitched a ride in a lorry belonging to the appellant and driven by an employee of the appellant. The driver was on duty at the time and was driving the lorry in the course of his employment. The respondent was going home to hand over his pay to his wife. On the way the lorry met with an accident and the respondent was injured. The driver of the lorry admitted liability. He also admitted not objecting to the respondent taking a lift on the lorry. The driver also admitted that he did not tell the respondent that he could not ride on the lorry. The High Court held that the appellant was vicariously liable. It would appear from the record of the proceeding in the High Court that the appellant attempted to introduce evidence relating to a certain directive which prohibited all employees from boarding government vehicles without permission. The statement of defence never pleaded that there was such a prohibition effecting the employee of the appellant and that the driver had allowed the respondent to travel in the lorry in breach of the prohibition. Delivering the judgment of the Supreme Court, Hashim Yeop A. Sani SCJ said at p. 492:

> Parties are bound by their pleadings and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition.

In the case of *Chung Khiaw Bank v. Hotel Rasa Sayang (supra)*, Hashim Yeop A. Sani CJ (as he then was) said at p. 685:

> The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned Judge and it would be wrong in our view to allow the alternative ground to be argued at this late stage.

In the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113, at p. 1116, Gunn Chit Tuan SCJ, said:

> We agreed with the following passage in the Judgment of the learned Judge in that case in which his Lordship stated:
>
> > The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. *In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleading and give effect to an entirely new case which the party had not made out in its own pleadings.* The trial of a suit should be confined to the pleas on which the parties are at variance. (emphasis added)

Applying the principles distilled from the above cases to the facts of the appeal before me, I hold that if what was deposed to in evidence by the appellants was indeed the defence of the appellants then they should have amended their statement of defence. In my judgment since this was not done, that defence should not be considered by the court. The result of this ruling would be that the defence pleaded in the statement of defence is not supported by the evidence of the appellants. Returning back to the evidence of the appellants, I continue my deliberation on the assumption that the defence and the circumstances alleged to have raised that defence as disclosed by the appellants in their evidence was pleaded in the statement of defence. What then would be the effect? In my view since this constitutes the crux of the appellants' case the answer to this question would also depend on whether this defence was expressly put to SP1 by the appellants when SP1 was giving her evidence. It is essential that a party's case be expressly put to material witness of his opponent when that witness is under cross examination. It is not merely a technical rule of evidence which can be conveniently ignored or forgotten. Failure to do so may be treated as an abandonment of the pleaded case and may bar the party which fails to put the defence from raising it in argument.

I find support for this principle from the case of *Browne v. Dunn* [1893] 6 R 67 which was followed in the case of *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen* [1995] 3 CLJ 639 and the case of *Sivalingam a/l Periasamy* [1996] 4 CLJ 545.

In *Aik Ming*, in delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA said at p. 658:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in arguments. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases as well.

Careful perusal of the appeal record would reveal that there is nothing to show that the defence deposed to in evidence by the appellants was expressly put to SP1 when she was under cross examination by the appellants' counsel. There was no explanation or valid reasons given as to why this was not done. Therefore in my view even going on the basis that the defence and the circumstances supporting that defence as stated by the appellants in their evidence had been pleaded in the appellants' pleading, the appellants still could not be allowed to rely on the defence.

Indeed before me Mr. E. Ramasamy's submission on behalf of the appellants was based on the defence as pleaded in the statement of defence. The curious state of affairs regarding the defence in the evidence given by the appellants being different from the defence pleaded did not escape the scrutiny and consideration of the learned trial judge. He concluded that the evidence of the appellants in court was an afterthought. In his grounds of judgment the learned trial judge said (at p. 18 of the appeal record);

> Keterangan mereka juga bertentangan dengan penyata pembelaan mereka. Ini memberi justifikasi bahawa keterangan mereka di mahkamah adalah baru direka oleh mereka berdua.

The learned trial judge also found as a fact that the appellants knew that they were signing a guarantee document. He had before him SP1 whose evidence he had heard and recorded. The signatures of both the appellants on the guarantee were not seriously in dispute. He found as a fact that both appellants were directors of Sundak Construction. In fact this was admitted by the appellants. He also found as a fact that the appellants had approved the resolution whereby Sundak Construction was authorised to accept from the respondent a fixed loan facility of RM200,000. This is crystal clear from the said resolution exhibited at p. 72 of the appeal record which also states that;

> AND such facilities shall be secured by way of first legal charge over third party's land held under Lots Nos. 29,30,31,32 and 42 and titles Nos. 13244,13242,15302,15296 and 16119 respectively in the town of Jasin, Malacca and **shall be guaranteed by all directors of the company jointly and severally in their personal capacities**. (emphasis added)

To my mind the evidence of SP1 coupled with the guarantee document shown at pp. 168-172 of the appeal record is sufficient to tilt the balance in favour of the respondent. But here there is this further evidence in the form of the resolution of Sundak Construction which was signed by the appellants as directors. This resolution fortified the evidence given by SP1. As such the learned trial judge was justified in accepting the evidence of SP1. In view of all the evidence in this case both oral and documentary I am not persuaded by the submission of the appellants' counsel that the appellants did not know what they had signed. The learned trial judge had the opportunity of hearing the appellants when they gave evidence and observing their demeanour. I have reminded myself that regarding the question as to which witnesses are trusworthy or which are not, the trial judge is in the better position to judge than the appeal court (see *Caldera v. Gray* [1936] MLJ 137). He concluded that the appellants' evidence could

not be believed. Having had the opportunity of considering the evidence of the appellants as recorded in the appeal record, I am not prepared to say that the learned judge was wrong. In this connection, as I have stated earlier, the defence as disclosed in the evidence of the defence was that they signed the document in the belief that it was a document relating to setting up of a company. Yet under cross examination SD1 stated that "saya tidak berminat untuk tubuhkan syarikat sebelum peristiwa ini". The question is if she had not wanted to form a company earlier why did SD1 on 23 December 1986 (the day the appellants signed the document), suddenly agree to sign a document to form a company? As I have stated earlier, the contradiction of the evidence given by the appellants and their defence as pleaded led the trial judge to the conclusion that their evidence in court was an afterthought. I have carefully considered this conclusion and test it in the light of all the evidence available in this case. In my judgment the learned trial judge was entitled to come to that conclusion and in doing so he had not misdirected himself or come to the wrong conclusion.

In the result, for the various reasons set out in this judgment, the appellants' appeal is dismissed with costs.